United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1251

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1251

B

REA EXPRESS, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

P/S

AIR EXPRESS INTERNATIONAL CORPORATION,

Intervenor.

ON PETITION FOR REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

O. D. OZMENT
Deputy General Counsel

GLEN M. BENDIXSEN
Associate General Counsel
Litigation and Research

BARBARA THORSON
Attorney
Civil Aeronautics Board
Washington, D. C. 20428

THOMAS E. KAUPER
Assistant Attorney General

CARL D. LAWSON
ARNOLD P. LAV
Attorneys
Department of Justice
Washington, D.C. 20530

THOMAS J. HEYE
General Counsel
Civil Aeronautics Board
Washington, D.C. 20428

INDEX

CITATIONS

Cases:

*Cases chiefly relied upon are marked by asterisks.

(INDEX CONTINUED)

(INDEX CONTINUED)

IN THE
UNITED STATES COURT OF APPEALS
FOR THF SECOND CIRCUIT

No. 74-1251

REA EXPRESS, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR EXPRESS INTERNATIONAL CORPORATION,

Intervenor.

ON PETITION FOR REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE ISSUE

Section 411 of the Federal Aviation Act provides, in relevant part, that the Civil Aeronautics Board may "upon complaint by any air carrier, * * * if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier * * * has been or is engaged in * * * unfair methods of competition in air transportation or the sale thereof." If the Board so considers that investigation is warranted, it proceeds to determine whether the method is unfair within the meaning of the Act. Pursuant

to section 411, petitioner filed two complaints alleging trade name confusion with the Board over which it declined to exercise jurisdiction. The single issue raised is whether the Board abused its discretion in concluding that it would not be in the interest of the public to investigate the complaints.

COUNTERSTATEMENT OF THE CASE

REA Express, Inc. (REA) seeks review of Board Order 73-8-134 issued on August 28, 1973 (J.A. 62(a))[1/] which dismissed without hearing two complaints filed by REA pursuant to section 411 of the Federal Aviation Act of 1958 (49 U.S.C. 1381).[2/] Review is sought also of Board Order 73-12-102 issued on December 26, 1973 (J.A. 80(a)) which denied REA's petition for reconsideration of the Board's dismissal action. The proceedings before the Board are set forth below. This Court has jurisdiction under section 1006 of the Act (49 U.S.C. 1486) (App. A-2).

A. The REA complaints.

On October 6, 1972 REA, an indirect air carrier under the Act,[3/] filed complaints against Wings and Wheels, Inc. d/b/a Air Express International Corporation ("AEI," intervenor herein) and Domestic Air Express, Inc. ("DAX"), also indirect air carriers,[4/] with the

---

1/ "J.A." references are to the joint appendix to the briefs.
2/ Statutory provisions and applicable Board regulations referred to herein are set forth infra (App. A-1 - A-6).
3/ Railway Express Agency, Grandfather Certificate, 2 C.A.B. 531 (1941); see section 101(3) for the definition of "air carrier" (49 U.S.C. 1301(3)) (App. A-1).
4/ Universal Air Freight Corp., Investigation, 3 C.A.B. 698 (1942).

Board's Bureau of Enforcement.[5/] The sole contention in both complaints was that "air express" appearing in AEI's and DAX's trade names, after its original and continuous use by REA since 1919 (J.A. 2(a)-3(a), 5(a)-7(a)), would lead to public confusion as to carrier identity and constituted an unfair method of competition prohibited by section 411. In additional support of this contention REA referred to (a) its substantial expenditures in advertising the term "air express;" (b) the distinctiveness of its service resulting in a secondary meaning of "air express;" and (c) the granting to it of the service mark "Air Express" by the U.S. Patent Office (id.). Based on the foregoing, and with AEI's and DAX's services competitive with REA's (J.A. 3(a), 7(a)), REA requested that AEI and DAX cease and desist from further use of their allegedly confusing trade names (J.A. 4(a), 8(a)). REA noted that name confusion complaints had not been filed previously because, until August 1969, REA was owned by the railroads which "prevented it from doing so" (J.A. 4(a), 7(a)).

AEI and DAX responded to REA's complaints (J.A. 9(a), 19(a)) by denying any actual or likely public confusion. Moreover, they

---

5/ The Board's procedural regulations provide for the filing of enforcement complaints with the Director of the Bureau of Enforcement (Part 302, 14 C.F.R. 302.1 et seq.). Such filing, however, does not of itself institute an enforcement proceeding. Rather, the regulations provide for either the docketing of a petition for enforcement when "in the opinion of the Director * * * there are reasonable grounds to believe that any provision of the act * * * has been or is being violated * * *" (section 302.206, 14 C.F.R. 302.206) or a determination by the Director not to institute a proceeding (section 302.205, 14 C.F.R. 302.205). In the latter event, the complainant may file a motion for review of that action with the Board (section 302.205(c), 14 C.F.R. 302.205(c)) (App. A-3 - A-6).

questioned whether REA at this time could raise the issue since AEI or its predecessors had been operating under names including "air express" for almost 40 years (J.A. 12(a)) and DAX likewise for 16 years (J.A. 20(a)).

B. The administrative proceedings.

By letter dated June 8, 1973 the Bureau of Enforcement Director notified the parties of his determination not to institute an enforcement proceeding (J.A. 23(a)). The Director acknowledged that a confusing similarity of names between air carriers is a method of competition which can support a finding of a violation under section 411 of the Act.

The Director stated that the standard to be met in establishing such a violation is that "a likelihood of substantial public confusion of identity between the parties exists, due to a similarity of names used by them, which will confuse and mislead a substantial number of members of the public and thus subject them to inconvenience and injury" (J.A. 27(a)). Where the names may be so similar, an inference of substantial public confusion may be made from that fact alone. Otherwise, the Director stated that (J.A. 28(a)):

> "[M]eeting the burden of establishing a likelihood of confusion requires proof of instances of confusion that are frequent, common, and persisting over a considerable period of time, not sporadic, isolated or de minimus [sic]. * * * The public confusion must, above all, be sufficient to justify the Board in finding that it would be 'in the interest of the public' to order the respondent to cease and desist

from using its name" (citations omitted).

The Director concluded that REA's complaints failed to set forth reasons for believing that the trade names at issue were inherently confusing (J.A. 29(a)-30(a)) or that, particularly in light of their use for at least 17 years and the absence in the complaints of any reference to "a single instance of actual confusion," there was the likelihood of such real and substantial public confusion as to require the protection of the public interest (J.A. 30(a)-31(a)).

On June 26, 1973 REA filed a motion for review with the Board (J.A. 32(a)) in which it alleged specifically for the first time that not only is actual public confusion as to carrier identity at issue but also actual confusion as to the character of service (J.A. 34(a)). REA moved to amend its complaints nunc pro tunc in this regard and to include an affidavit attached to the review motion assertedly setting forth examples of identity and service confusion (J.A. 36(a)-37(a)).

AEI and DAX filed answers to the motion for review (J.A. 54(a), 49(a)) continuing to deny that the complaints, even if amended, presented a basis for an enforcement proceeding (J.A. 58(a), 52(a)).

On December 26, 1973 the Board issued Order 73-8-134 affirming the Director's determination and ordering that the complaints be dismissed (J.A. 62(a)).[6/] The Board's action rested on the conclusion

---

6/ The Board granted REA's request to amend the complaints for purposes of review (J.A. 63(a)).

that REA failed "to make a threshold showing of reasonable grounds for believing that a state of facts exists which warrants assumption of jurisdiction" (J.A. 66(a)). The Board noted, in this connection, that assumption of jurisdiction under section 411 is conditioned upon an affirmative determination by the Board that the public interest justifies the investigation of a method of competition alleged to be unfair. Moreover, as laid down by the Supreme Court in American Airlines, Inc. v. North American Airlines, Inc., et al., 351 U.S. 79, 83 (1956), the public interest which will justify such an investigation must be "specific and substantial" (J.A. 63(a)-64(a)).

The Board thus looked to the alleged nature of public confusion resulting from the use of the words "air express" in the three carriers' trade names and, after careful consideration of the complaints, motion for review, and answers thereto, it found this "state of facts" wanting in terms of a "specific and substantial" need to protect the public interest (J.A. 63(a), 64(a)). Whether viewed as confusion with respect to carrier identity or character of service, the Board found no reason to infer that the singular appearance of "air express" in the parties', or in any number of companies', trade names is so likely to result in substantial public confusion as to warrant Board investigation (J.A. 64(a)-65(a), 67(a)). Apart from the lack of any such inherent confusion, the Board found no reason to believe that there has been sufficient actual public confusion (J.A. 65(a)), noting the long use by all of the parties of "air

express" in their trade names without some manisfestation, until now, of resultant confusion (J.A. 65(a)-66(a)). The examples submitted by REA also were unpersuasive in the Board's view, being general and conclusory, and lacking in details (J.A. 66(a)).

The Board concluded that the protection of the public interest did not warrant "commitment of the Board's staff and time resources to a formal proceeding" when "[t]here are many pressing matters facing the Board and its staff and, in the Board's judgment, its limited resources can be more profitably devoted to those problems than to REA's complaint[s]" (J.A. 67(a)). The Board concluded, too, that,

> "While a few formal Section 411 proceedings have been instituted in the past, based on alleged name confusion, they came, with one exception, in the early 1950's. That was an era in which air service did not play nearly so large a part in meeting the transportation needs of nearly so many people as is true today. We think it reasonable to believe that the users of air service today are considerably more sophisticated than they were 20 years ago and that the risks of substantial confusion with respect to carrier identity and type of service are correspondingly small" (J.A. 67(a)).

Accordingly, the Board concluded that it would not be in the interest of the public to institute a section 411 proceeding in response to REA's complaints (J.A. 68(a)).

REA petitioned for reconsideration (J.A. 69(a)) and, after answers by AEI and DAX (J.A. 73(a), 79(a)), the Board denied the petition on December 26, 1973 in Order 73-12-102 (J.A. 80(a)).

ARGUMENT

I. Introduction: the statutory scheme.

REA's complaints were filed under section 411 of the Act which provides that the Board "may * * * upon complaint by any air carrier, * * * if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier * * * has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof (App. A-1).

REA's basic premise is that when such complaints are filed and the Board determines that they should be dismissed without further investigation or hearing, the reviewing court should reverse that determination if the facts alleged show "reasonable grounds for believing" or a "prima facie case" that the charged air carrier has engaged in unfair or deceptive practices or unfair methods of competition in air transportation (REA Br. 6-7, 11). The Board's dismissal of the complaints herein, according to REA, was predicated on a factual finding that the use of the words "air express" in AEI's and DAX's trade names has not caused public confusion constituting an unfair method of competition. Further, it is argued, that finding should be set aside because it is neither adequately explicated nor supported by substantial evidence as required by section 1006(e) of the Act (49 U.S.C. 1486(e)) (App. A-2 - A-3).[7/]

7/ REA thus relies on Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) and related cases applying the principle that an agency

(Footnote continued)

REA completely misconceives the Board's function as well as the terms of section 411, and misconstrues the Board's determination in this case. Under section 411 the Board must make a positive finding that the public interest requires investigation before proceeding under that section, since such a finding is "a condition upon the assumption of jurisdiction * * * to investigate trade practices and methods of competition and determine whether * * * they are unfair" American Airlines v. North American Airlines, supra 351 U.S. at 83. Indeed, even in complaint proceedings arising exclusively under section 1002 of the Act, 8/ which provides that where "there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of * * * the Board to investigate * * *," a similar discretion applies. The courts have uniformly held that the Board is not required to proceed notwithstanding that the complaint is legally sufficient if the Board finds that proceeding would not be in the public interest. Flight Engineers' Int'l Ass'n EAL Chapter, AFL-CIO v. CAB, 332 F.2d 312, 314-15 (C.A.D.C. 1964);

Footnote continued--

decision must contain adequate findings supported by substantial evidence. As we show, the Board's order herein raises no issue of a failure to comply with that principle and constitutes a sustainable exercise of administrative discretion since it has a reasonable basis in law and fact, and hence is neither arbitrary nor capricious.

8/ That section (49 U.S.C. 1482) (App. A-2) relates to complaints of alleged violations of the Act's provisions generally.

Flying Tiger Line, Inc. v. CAB, 350 F.2d 462, 465 (C.A.D.C. 1965), cert. denied, 385 U.S. 945; Trailways of New England, Inc. v. CAB, 412 F.2d 926, 930 (C.A. 1, 1969). As the court stated in Flight Engineers' (supra 332 F.2d at 314-15):

> "[T]he Board does have a discretionary power to dismiss a complaint which states reasonable grounds for believing that the Act has been or is being violated when it reasonably concludes that it would be in the public interest to do so, although this discretion is subject to review * * * [and] this discretion to be meaningful must contemplate dismissals for reasons other than the failure of the complaint to allege facts constituting a violation of the Act."

Accord, Pan American-Grace Airways, Inc. v. CAB, 178 F.2d 34 (C.A.D.C. 1949); Transcontinental Bus System, Inc. v. CAB, 383 F.2d 466 (C.A. 5, 1967); Nebraska Dep't of Aeronautics v. CAB, 298 F.2d 286 (C.A. 8, 1962).

These decisions reflect the basic concept underlying the Act. The Board was not created to adjudicate private disputes. On the contrary, public interest is the touchstone for Board action, including disposition of complaints. Thus, the Board must have considerable latitude in controlling "the range of investigation" (Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940)) and must be free to act where, in its judgment, its energies and resources can be most productively expended. If the Board were required to hold a hearing irrespective of existing circumstances or its views as to the ultimate disposition of the matter, it would be difficult,

if at all possible, for it to discharge its other duties, and these may often involve "more immediately important concerns." United States v. Morton Salt Co., 338 U.S. 632, 647 (1950).

The very nature of the threshold inquiry under section 411, i.e., whether investigation or action is required "in the interest of the public," normally requires consideration of both the complaint "and the attendant facts and circumstances" Seaboard & Western Airlines, Complaint, 31 C.A.B. 115, 117 (1960). Such factors may appear either from the pleadings of other parties, or from other sources of information available to the Board. This method of inquiry received judicial approval in the cases cited supra, and was utilized here. REA errs in contending that the Board made "no basic findings of public interest at all," and merely determined that "REA had made no showing that there were reasonable grounds for belief that substantial confusion existed" (REA Br. 6). Quite to the contrary, the Board characterized the inquiry as "whether it would be in the public interest for the Board to exercise its jurisdiction under Section 411" (J.A. 63(a)-64)(a)). 9/ After assessing the pleadings, submissions, and the attendant

9/ Accordingly, the instant case is entirely distinguishable from Trailways of New England, supra 412 F.2d 926, relied on by REA (REA Br. 6-7). There the Court found that the Board had dismissed a complaint without hearing solely upon the basis that the charge that certain fares were discriminatory had no factual or legal basis -- a finding the Court held was erroneous -- and that the Board had not "exercised a discretion to determine that it would not be in the public interest to investigate at this time." Further, the Court cited with approval Flight Engineers' and other authorities set forth above upholding the Board's discretionary authority to dismiss complaints on that ground, although the Court suggested that such discretion may be limited where the charge is unlawful discrimination (412 F.2d at 931-32).

circumstances, the Board concluded that (J.A. 66(a)-68(a)):

> "[REA] is required to make a threshold showing of reasonable grounds for believing that a state of facts exists which warrants assumption of jurisdiction. REA's showing simply does not convince us that respondents' use of the words 'air express' in their corporate or trade names has caused, or is likely to cause, public confusion of sufficient substance to warrant commitment of the Board's staff and time resources to a formal proceeding. * * * There are many pressing matters facing the Board and its staff and, in the Board's judgment, its limited resources can be more profitably devoted to those problems than to REA's complaint[s]. * * *
>
> Based upon the foregoing, the Board finds that it would not be in the interest of the public to institute a proceeding under Section 411 in response to REA's complaints, and that the complaints do not set forth facts warranting investigation or other action" (citations omitted).

We show below that this determination has a reasonable basis in fact and law; therefore it was well within the Board's discretion under section 411.

II. The Board did not abuse its discretion under section 411 of the Act in concluding that it would not be in the interest of the public to direct hearing or to otherwise proceed on REA's complaints.

As the Supreme Court said in American Airlines v. North American Airlines, supra 351 U.S. at 83, the initial and dispositive issue raised under section 411 is whether there are grounds for believing that the alleged public confusion flowing from the parties' trade names had or would affect a public interest sufficiently "specific and substantial"

to authorize the exercise of jurisdiction by the agency (see J.A. 63(a)-64(a)).[10/] Here, with regard to the first aspect of this question, the alleged public confusion itself allegedly stemming from the use by AEI and DAX of the term "air express," the Board properly examined the record for a reasonable showing of the existence and nature of that confusion. Previously, the Board has found that trade names so essentially similar can, on the basis of that fact alone, lead to an inference of potential public confusion (Air America, Inc., Section 411 Proceeding, 18 C.A.B. 810, 840 (1954)). Here, it found no basis for inferring that the mere fact that the term "air express" is common to the names in question makes them so inherently confusing as to require public protection (J.A. 64(a)-65(a)). The Board observed that trade names in the air-transportation industry, as a practical matter, often include comparable generic terms -- for example, "air freight," "airlines" or "air lines." Moreover, the Board noted that, apart from AEI and DAX, in Washington, D.C. alone the 1973 telephone directory listed ten other companies with "air express" in their trade names. No explanation has been forthcoming as to why the trade names of AEI and DAX in particular might present such likelihood of public

10/ The Supreme Court noted that section 411 was molded after section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and that under the latter act the "Commission may not employ its powers to vindicate private rights * * *" (id.). Citing Federal Trade Comm'n v. Klesner, 280 U.S. 19 (1929).

confusion vis-a-vis REA as to require investigation by the Board.

Without the possible inference of inherent confusion, the Board next considered the likelihood of confusion as reasonably shown by actual instances. That such instances should be readily at hand, if in fact public confusion was present to the "specific and substantial" degree required in terms of the public interest, was a logical view since all of the companies involved have been in business for considerable periods of time. Thus, REA by its own admission originated the first air express shipment in 1910 (J.A. 2(a), 5(a), REA Br. 2); AEI or its predecessors, with "air express" names, first received Board authorization 25 years ago; and DAX has existed for about 17 years (J.A. 65(a)). Throughout this entire period, never, until the instant complaints, was the Board able to ascertain that any member of the public had complained to the Board of either identity or service problems resulting from "air express" name confusion among these or other air express companies. As the Board observed from experience: "The public always has been free to complain informally to the Board of service problems and has done so freely and frequently with respect to a wide variety of problems" (J.A. 65(a)-66(a)).

In light of all of the above factors, it was entirely reasonable for the Board to consider that a showing of actual instances of confusion was essential to a demonstrated likelihood of public confusion. REA, accordingly, amended its complaints to include examples of "instances of confusion reported on [by REA employees around the

country] during a one week period" (REA Br. 4) which the Board carefully noted in reviewing the action taken by the Bureau of Enforcement. REA argues that this information constitutes "an impressive indication of the extent of confusion that exists among the shipping public * * * [because] such detailed information could be produced within the space of a week" (REA Br. 10). Therefore, in REA's view:

> "One can only conclude that a more extensive investigation of shipper confusions would result in widespread evidence of confusion. REA offered to undertake such an investigation, if the Board would grant it a hearing or remand the case to the Bureau of Enforcement, but the Board could only find that it was not convinced of the likelihood of substantial confusion" (REA Br. 10) (emphasis added).

More accurately, the proffered examples did not convince the Board of public confusion of "sufficient substance" (J.A. 66(a)-67(a)), but this is a distinction of small significance in the context of the character of REA's submission and its overall timing. The latter point is made, not with regard to the omission of confusion examples from the complaints as originally filed with the Bureau, but in the context of REA's assertion to the Board that, but for its ownership by the railroads until August 1969, it would have complained sooner about the alleged name confusion problem (J.A. 4(a), 7(a)). The Board accepted at "face value" that in some way the railroads prevented action on this matter by REA until

August 1969. This did not explain, however, why REA continued to remain silent for another three years until its complaints surfaced on October 6, 1972. No answer to this puzzling three-year delay is offered in the instant proceeding notwithstanding that REA continues to emphasize the restraint on its action to the Court (REA Br. 3) with the apparent implication to be garnered, previously by the Board and now by this Court, that a substantial confusion problem existed prior to 1969 concerning which REA was helpless to remedy.

The Board reasonably noted REA's failure to act for a considerable time after it was free to do so when it turned its attention to the examples which REA now admits, after this three-year period of freedom to complain, it hurriedly compiled in one week (J.A. 42(a)-48(a)).[11/] In evaluating the likelihood of confusion as indicated by actual instances of confusion, the Board has held, as specifically set forth by the Director of the Bureau of Enforcement in his letter to the parties (J.A. 28(a)), that such instances should be frequent or common and persisting over a considerable period of time as opposed to being sporadic, isolated or de minimis. Air America, supra 18 C.A.B. at 824, 837, 840; North

11/ Those few items which contain dates run from May 31, 1973 through June 19, 1973.

American Airlines, Section 411 Proceeding, 18 C.A.B. 96, 99 (1953); Southwest Airways, Name Change, 24 C.A.B., 818, 820 (1956). 12/ REA set out 30 items from over 20 U.S. cities of which only 10 (not 22, see REA Br. 4) could be considered "specific instances" of confusion. Of these, 6 included the name and address of the shippers involved and 3 included the waybill numbers of their shipments. Twelve items consisted of reference, with no names or times, to misdirected telephone calls and mail deliveries, 3 items included: (a) a survey in April 1973 of air carrier customer service personnel in California which "showed that 60% of them were confused over the relationship between * * * [DAX, AEI and REA]" (J.A. 44(a)); (b) the New Jersey Telephone Company's internal listing places AEI "as a subordinate listing under REA" (J.A. 46(a)); and (c) in San Diego an REA manager, previously employed by DAX, reported that he and other DAX personnel would answer any telephone request for "Air Express" by saying, "Yes, this is Domestic Air Express, may we help you," with the result of securing business in 75 percent of the cases (J.A. 47(a)).

12/ REA's charges that if its submitted examples were insufficient, "there was no statement from the Board as to what type of evidence would have been sufficient" (REA Br. 10); and that the Board "must explain what standards it has used and will use in determining what showing would be sufficient" as reasonable grounds for believing that confusion exists or is likely, but that the Board "has failed to set such a standard" (REA Br. 11), are wholly without merit. As indicated above, prior to any submission by REA to the Board, standards were summarized with appropriate citations to prior Board cases by the Director.

It would be difficult, indeed, to speculate as to what the last three items demonstrate in terms of the public's actual inability to secure the service of the particular air express company it was seeking, but clearly the Board was not misguided in its judgment that, at best, ten instances and a dozen references to unspecified telephone and mail problems amount to a showing of confusion that "is general in nature, setting forth, for the most part, broad conclusions" -- "singularly lacking in specifics" (J.A. 66(a)).

The Board concluded, therefore, that REA's showing of actual confusion failed simply as a "threshold showing of reasonable grounds for believing * * * that respondents' use of the words 'air express' in their corporate or trade names has caused, or is likely to cause, public confusion of sufficient substance" (J.A. 66(a)-67(a)).[13/] In these circumstances, the Board reasonably went on to find that the public interest in relation to this particular alleged unfair method of competition did not "warrant commitment of the Board's staff and time resources to a formal proceeding" when, in its judgment, the Board's "limited resources can be more

---

13/ In its motion to review the Director's dismissal of the complaints, REA placed belated emphasis on the alleged uniqueness of the character of REA's service as contrasted with the confusion of carrier identity relied on before the Director. Cited in this regard was the Board's opinion in the Air Freight Forwarder Case, 9 C.A.B. 473, 488 (1948), that REA's service "is a separate and distinct expedited service differing in many essential details from air freight service" (J.A. 34(a), see REA Br. 2). However, as the Board noted (J.A. 67(a)) its conclusion that there has been no showing of substantial confusion

(Footnote continued)

profitably devoted to * * * [the] many pressing matters facing the Board and its staff * * *" (J.A. 67(a)).

We submit that the Board's determination is entitled to affirmance by this Court. That determination reflects in particular a proper exercise of the Board's special expertise as exemplified by its statement "that increasing public sophistication [as to air-transportation services] has significantly reduced the risk of serious confusion problems" (J.A. 67(a)). Having overseen the development of these services since 1938, the Board's action was well within its discretionary powers. It is the special competence of the agency

---

Footnote continued--

historically or in REA's affidavit, discussed above, applied both to carrier identity and to character of service. Furthermore, the Board took note of its pending proceeding which involves the issue of whether it should continue to authorize REA's distinct operating authority which stems from the Board's continuing approval over the years of REA's agreement with the air lines to jointly provide air express service, or whether it should grant REA the same operating authority under which other indirect air carriers, such as AEI and DAX, operate and provide essentially the same service. The pendency of that proceeding was, in the Board's view, an additional ground for not proceeding on the complaints insofar as they rested on the alleged uniqueness of REA's service. On December 7, 1973, on the ground, inter alia, that REA's service was no longer truly distinct, the Board disapproved REA's agreement with the air lines and granted REA the authority granted other indirect air carriers (Order 73-12-36 (December 23, 1973), motion for reconsideration denied Order 74-5-25 (May 6, 1974)). That order is pending review in this Court in REA Express, Inc. v. CAB, No. 74-1611.

"to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." Moog Industries, Inc. v. Federal Trade Comm'n, 355 U.S. 411, 413 (1958); accord, Trailways of New England, supra 412 F.2d at 932.

CONCLUSION

The Board did not abuse its discretion in concluding that the REA complaints should be dismissed and its orders should be affirmed.

Respectfully submitted,

O.D. OZMENT
Deputy General Counsel

GLEN M. BENDIXSEN
Associate General Counsel
Litigation and Research

BARBARA THORSON
Attorney
Civil Aeronautics Board
Washington, D.C. 20428

THOMAS E. KAUPER
Assistant Attorney General

CARL D. LAWSON
ARNOLD P. LAV
Attorneys
Department of Justice
Washington, D.C. 20530

THOMAS J. HEYE
General Counsel
Civil Aeronautics Board
Washington, D.C. 20428

Dated: July 15, 1974

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 737, as amended, 49 U.S.C. 1301 et seq.:

TITLE I -- GENERAL PROVISIONS

DEFINITIONS

Sec. 101. [72 Stat. 737, as amended by 75 Stat. 467, 76 Stat. 143, 82 Stat. 867, 84 Stat. 921, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires--

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

TITLE IV -- AIR CARRIER ECONOMIC REGULATION

* * * * *

METHODS OF COMPETITION

Sec. 411. [72 Stat. 769, 49 U.S.C. 1381] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

* * * * *

TITLE X -- PROCEDURE

* * * * *

COMPLAINTS TO AND INVESTIGATIONS BY THE SECRETARY OF TRANSPORTATION AND THE BOARD

Filing of Complaints Authorized

Sec. 1002. [72 Stat. 788, 49 U.S.C. 1482] (a) Any person may file with the Secretary of Transportation or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this Act, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary of Transportation or the Board to investigate the matters complained of. Whenever the Secretary of Transportation or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Secretary of Transportation or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Secretary of Transportation or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

* * * * *

JUDICIAL REVIEW OF ORDERS

Orders of Board and Secretary of Transportation subject to Review

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under

this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

Relevant provisions of the Board's Procedural Regulations, 14 C.F.R. 302.1 et seq.:

PART 302 -- RULES OF PRACTICE IN ECONOMIC PROCEEDINGS

* * * * *

SUBPART B -- RULES APPLICABLE TO ECONOMIC ENFORCEMENT PROCEEDINGS

* * * * *

Section 302.201 Formal complaints.

Any person may make a formal complaint to the Board with respect to anything done or omitted to be done by any person on contravention of any economic regulatory provisions of the act, or any rule, regulation, order, limitation condition or other requirement established pursuant thereto. Every formal complaint shall conform to the requirements of §302.3, concerning

the form and filing of documents. The submission of a formal complaint by a person other than an enforcement attorney (hereinafter called a third party) shall not in itself result in the institution of a formal economic enforcement proceeding and a hearing with respect to the complaint unless and until the Director of the Bureau of Enforcement dockets a petition for enforcement with respect to such complaint, or a portion thereof, in accordance with §302.206. A formal complaint, whether filed by a third party or an enforcement attorney, may be amended at any time prior to the service of an answer to a complaint. Thereafter, such amendment may be filed only upon the grant of a motion filed in accordance with §302.18, except that permission to amend a third-party complaint after the filing of an answer but before the docketing of a petition for enforcement must be obtained from the Director of the Bureau of Enforcement.

* * * * *

Section 302.204 Third-party complaints.

(a) A third-party complaint, and any amendments thereto, submitted pursuant to §302.201 shall be served by the person filing such documents upon each party complained of and upon the Director of the Bureau of Enforcement.

(b) Within fifteen (15) days after the date of service of a third-party complaint, each person complained of shall file an answer in conformance with and subject to the requirements of §302.207(b). Extensions of time for filing an answer may be granted by the Director of the Bureau of Enforcement for good cause shown.

(c) A person complained against in a third-party complaint may offer to satisfy the complaint through submission of facts, offer of settlement or proposal of adjustment. Such offer shall be in writing and shall be served, within fifteen (15) days after service of the complaint, upon the same persons and in the same manner as an answer. The submittal of an offer to satisfy the complaint shall not excuse the filing of an answer.

(d) Motions to dismiss a third-party complaint shall not be fileable prior to the docketing of a petition for enforcement with respect to such complaint or a portion thereof.

Section 302.205 Procedure when no enforcement proceeding is instituted.

(a) Within a reasonable time after a formal third-party complaint has been processed, the Director of the Bureau of Enforcement shall either institute an enforcement proceeding in accordance with §302.206 or shall advise the complainant in writing that no enforcement proceeding will be instituted in whole or in part, with respect to his complaint, and the reasons therefor.

(b) The letter of the Director of the Bureau of Enforcement shall conform to the requirements of §302.3 and shall be deemed an order of the Board dismissing the complaint unless review of such ruling is requested by the complainant or is initiated by the Board in accordance with the provisions of paragraph (c) of this section.

(c) Within twenty (20) days after service of a letter from the Director of the Bureau of Enforcement refusing to institute an enforcement proceeding with respect to all or any part of a complaint, the complainant may file a motion with the Board to review such action. The proceedings on such motion shall be in accordance with §302.18. Upon conclusion of such proceedings, the Board shall enter an order either dismissing the complaint or directing such other action as it deems appropriate. If a complainant does not appeal, the Board may review the action of the Director of the Bureau of Enforcement on its own initiative within 15 days after the expiration date for appeal.

Section 302.206 Docketing of petition for enforcement.

Whenever in the opinion of the Director of the Bureau of Enforcement there are reasonable grounds to believe that any provision of the act or any rule, regulation, order, limitation, condition or other requirement established pursuant thereto, has been or is being violated, that, in the case of third-party complaints, efforts to satisfy a complaint insofar as required by §302.204 have failed, and that investigation of any or all of the alleged violations is in the public interest, the Director of the Bureau of Enforcement may institute an economic enforcement proceeding by docketing a petition for enforcement. The petition for enforcement shall incorporate by reference a formal complaint submitted pursuant to §302.201 or shall be accompanied

by a complaint complying with §302.3 which is verified by an enforcement attorney. The petition for enforcement, and accompanying complaint, if any, shall be formally served upon the respondent and complainant. The proceedings thus instituted shall be processed in regular course in accordance with this part. However, nothing in this part shall be construed to limit the authority of the Board to institute or conduct any investigation or inquiry within its jurisdiction in any other manner or according to any other procedures which it may deem necessary or proper.

* * * * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., Petitioner, v. CIVIL AERONAUTICS BOARD, Respondent, AIR EXPRESS INTERNATIONAL CORPORATION, Intervenor.	No. 74-1251

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the printed brief for respondent by causing two copies to be mailed to:

Peter G. Wolfe, Esq.
REA Express, Inc.
219 East 42nd Street
New York, New York 10017

John M. Gibbons, Esq.
Stroock, Stroock and Lavan
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

I further certify that the printed brief is identical to the type-written brief previously filed and served, save for correction of typographical errors and the like.

Glen M. Bendixsen
Associate General Counsel
Litigation and Research
Civil Aeronautics Board
Washington, D.C. 20428

Dated: July 19, 1974